

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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JACOB LOFARO, PPA NICOLE)	
LOFARO,)	
)	
Plaintiffs,)	
)	
V.)	Civil Action No. 04-11297-MLW
)	
DEBORAH BRADLEY, LOUIS LAZ ¹ ,)	
and ASSOCIATES IN OBSTETRICS)	
& GYNECOLOGY,)	Formerly: Essex County
)	Superior Court
Defendants.)	Civil Action No.
<hr/>)	03-536

**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COUNTS IV THROUGH VI
OF THE COMPLAINT AS THEY APPLY TO DEFENDANT LOUIS LAZ, M.D.**

The United States of America, on behalf of Louis Laz, M.D. (hereinafter "the defendant") respectfully requests that this Court dismiss with prejudice Counts IV through VI of the plaintiff's complaint in the above-captioned matter pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure as this Court lacks subject matter jurisdiction where the plaintiff has failed to timely file an administrative claim as required by the Federal Tort Claims Act. 28 U.S.C. § 2401(b).

BACKGROUND

On or about January 14, 2004, the plaintiff filed a complaint in the Essex County Superior Court for the Commonwealth of Massachusetts. The complaint alleges medical malpractice by

¹A Motion to Substitute the United States of America as the Proper Party Defendant for Louis Laz, M.D., is pending.

Deborah Bradley, M.D., Louis Laz, M.D., and Associates in Obstetrics & Gynecology, Inc. The complaint alleges that on or about April 10, 1998, Dr. Laz failed to adequately and properly diagnose and treat her son Jacob during his delivery. The plaintiff alleges that said negligence caused the plaintiff "to sustain severe and permanent personal injuries; has incurred and will continue to incur great expense for his medical, surgical, and hospital care and treatment; has suffered and will continue to suffer great pain of body and anguish of mind; has been and will continue to be hospitalized; has been and will continue to be unable to pursue normal activities; and his ability to enjoy life has been permanently adversely affected."² The complaint also makes identical allegations against a Dr. Bradley and Associates in Obstetrics & Gynecology, Inc., however, both of these defendants were not deemed federal employees by the Federally Supported Health Centers Assistance Act of 1992, 42 U.S.C. § 233(g)-(n) (hereinafter "FSHCAA"), and, thus, are not covered by the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2401(b), and 2671-80 (hereinafter "FTCA").

On or about June 14, 2004, the United States filed a Notice of Removal with the United States District Court for the District of Massachusetts on behalf of the defendant Dr. Laz. Attached to

²See the complaint Count IV, paragraph 6, Count V, paragraph 5, and Count VI, paragraph 7.

the Notice of Removal was a certification by the United States Attorney for the District of Massachusetts that the defendant Dr. Laz was acting within the scope of his employment as an employee of the United States at the time of the conduct alleged in the complaint. In addition, the United States filed a Notice of Filing Notice of Removal with the Essex County Superior Court.

On or about June 16, 2004, the defendant filed a Motion to Substitute the United States as Proper Party Defendant for Louis Laz, M.D. and Memorandum in Support of said motion with the United States District Court for the District of Massachusetts.

ARGUMENT

I. Standard of Review for a Motion to Dismiss

A motion to dismiss challenges the sufficiency of the complaint without being subjected to discovery or other costly and time-consuming proceedings. Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729, 738 (9th Cir. 1987). As is customary, the factual allegations of a complaint are taken as true. E.g., Edwards v. John Hancock Mutual Life Insurance Co., 973 F.2d 1027, 1028 (1st Cir. 1992); Coyne v. City of Somerville, 972 F.2d 440, 443 (1st Cir. 1992). See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); McDonald v. Commonwealth of Massachusetts, 901 F. Supp. 471, 475 (D. Mass. 1995).

II. Motion to Dismiss Pursuant to Rule 12(b)(1)

This is a medical malpractice action brought by the

plaintiff against the defendant. During the period of time alleged in this complaint, the defendant was an employee of the Lynn Community Health Center (hereinafter "LCH"). The Secretary of Health and Human Services has deemed LCH eligible for FTCA³ coverage pursuant to the FSHCAA⁴ on March 15, 1994, and renewed its deemed status effective June 23, 1996.⁵ The FSHCAA provides coverage to federally supported health centers and their employees for acts or omissions which occurred on or after January 1, 1993, or when the health center is deemed eligible for coverage, whichever is later. 42 U.S.C. § 233(a). Thus, all actions for negligence of employees of health centers covered under the act must be brought pursuant to the FTCA. The United States Attorney for the District of Massachusetts has certified that the defendant was acting within the scope of his employment with LCH at the time of the alleged medical malpractice.⁶ Consequently, the allegations against the defendant are covered by the FSHCAA and the exclusive remedy is provided by the FTCA.

Under the FTCA, the only proper part defendant is the United

³28 U.S.C. §§ 1346(b), 2401(b), and 2671-80.

⁴42 U.S.C. § 233(g)-(n).

⁵Copies of the deeming letters were attached to the previously filed Notice of Removal as Exhibit B.

⁶The original certification of scope of employment by the United States Attorney for the District of Massachusetts was filed with the Notice of Removal as Exhibit C.

States. 28 U.S.C. § 2679.

For a plaintiff to maintain a suit against the United States he must establish a waiver of sovereign immunity permitting such a suit. See Block v. North Dakota, 461 U.S. 273, 287 (1983). The United States is "absolutely shielded from tort actions for damages unless sovereign immunity has been waived." United States v. Testan, 424 U.S. 392, 399 (1976); United States v. Mitchell, 445 U.S. 535, 538 (1980). A waiver of sovereign immunity cannot be implied, but must be unequivocally expressed. Testan, 424 U.S. at 399. Thus, except as Congress has consented, no court has jurisdiction to hear an action against the United States. Id.

The FTCA provides this consent and is the exclusive damages remedy for tort claims against the United States, its agencies, or its officials. 28 U.S.C. § 2679(a) (1982); see, Eveland v. Director of Central Intelligence Agency, 843 F.2d 46, 49-50 (1st Cir. 1982). However, Congress has explicitly conditioned its waiver of sovereign immunity for tort claims against the United States on the filing of an administrative claim with the appropriate federal agency. 28 U.S.C. § 2675(a) (1982); see, Eveland, 843 F.2d at 50. "Under the Federal Tort Claims Act, it is a jurisdictional prerequisite to the filing of suit in the United States District Court that the plaintiff must first exhaust his administrative remedies." Gilday v. Webster, 582 F.

Supp. 732, 733 (D. Mass. 1984) (citing 28 U.S.C. § 2675(a)), emphasis added; see, Hagmeyer v. Department of Treasury, 647 F. Supp. 1300, 1304 (D.D.C. 1986) (citing Hohri v. United States, 782 F.2d 227, 345 (D.C. Cir. 1986)). This jurisdictional FTCA filing requirement is not subject to equitable waiver. See, Hagmeyer, 647 F. Supp. at 1304; Romero-Barcelo v. Brown, 478 F. Supp. 646 (D.P.R. 1979).

According to the records of the Department of Health and Human Services (hereinafter "HHS"), the plaintiff has failed to file an administrative claim as required by the FTCA and the two year statute of limitations for filing an administrative claim has long since expired.⁷ Therefore, the Court lacks subject matter jurisdiction to hear the claim against the defendant under the FTCA and a motion to dismiss is appropriate.

CONCLUSION

For all of the above-mentioned reasons, the defendant respectfully requests that this Court dismiss with prejudice Counts IV through VI of the plaintiff's complaint in the above-captioned matter pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure as this Court lacks subject matter jurisdiction where the plaintiff has failed to timely file an administrative claim as required by the Federal Tort Claims Act. 28 U.S.C. § 2401(b).

⁷See Declaration of Beverly R. Dart attached as Exhibit A.

Respectfully submitted,

MICHAEL J. SULLIVAN
United States Attorney

Dated: June 22, 2004

/S/ Christopher R. Donato
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CERTIFICATE OF SERVICE

I hereby certify that on this day service of the foregoing Motion to Dismiss has been made upon the following by depositing a copy in the United States mail, postage prepaid to:

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Dated: June 22, 2004

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